

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ALLEN, ALLEN & ASSOCIATES, L.L.C.,)
and ALLEN, ALLEN & ASSOCIATES)
MANUFACTURING, L.L.C.)

Plaintiffs,)

v.)

SERVA CORPORATION,)

Defendant,)

and)

Case No. 10 CV-707-GKF-TLW

SERVA CORPORATION and)
SERVA GROUP, LLC)

Counterclaim Plaintiffs,)

v.)

ALLEN, ALLEN & ASSOCIATES, L.L.C.,)
and ALLEN, ALLEN & ASSOCIATES)
MANUFACTURING, L.L.C.)

Counterclaim Defendants,)

and)

SERVA CORPORATION and)
SERVA GROUP, LLC)

Third Party Plaintiffs,)

v.)

THOMAS E. ALLEN, an individual,)

Third Party Defendant.)

THIRD PARTY COMPLAINT

Defendant and Counterclaim Plaintiff Serva Corporation (“Serva”), and Counterclaim Plaintiff Serva Group, LLC, (collectively herein “Third Party Plaintiffs”) for their Third Party Complaint against Thomas E. Allen (“Tom Allen”), allege and state as follows:

Jurisdiction and Venue

1. Third Party Plaintiffs’ claims arise under the United States patent laws, 35 U.S.C. § 1 *et . seq.*
2. The Court has subject matter jurisdiction over Third Party Plaintiffs’ claims based on 28 U.S.C. §§ 1331 and 1338.
3. Venue is proper in this judicial district as a third party complaint in the originally filed action based on 28 U.S.C. §§ 1391 and 1400.

Parties

4. Serva is a Texas corporation with its corporate headquarters located at 14301 Caliber Drive, Suite 220, Oklahoma City, Oklahoma.
5. Serva Group, LLC is a Delaware limited liability company with its corporate headquarters located at 14301 Caliber Drive, Suite 220, Oklahoma City, Oklahoma.
6. Upon information and belief, Tom Allen is an individual and resident of Oklahoma.

Background

7. Upon information and belief, Tom Allen is president, manager, and/or principal of Allen, Allen & Associates (“Allen Associates”) and Allen, Allen & Associates Manufacturing (“Allen Manufacturing”).
8. Tom Allen is listed as the sole inventor of U.S. Patent No. 6,749,330 (the “’330 patent”) and possessed an ownership interest in the ‘330 patent prior to November 2, 2007. The

‘330 patent was filed on November 1, 2001 and issued on June 15, 2004. The ‘330 patent includes claims directed to a powder mixer. A copy of the ‘330 patent is attached hereto as Exhibit “A”.

9. On November 2, 2007, Allen, personally and on behalf of Allen Associates, sold and assigned all right, title and interest in the ‘330 patent and other various intellectual property assets to Serva for a substantial sum of money. Serva has retained ownership of the ‘330 patent since November 2, 2007.

10. Beginning in January 2008, Serva granted rights to Serva Group, LLC permitting the manufacture and sell of products covered by the ‘330 patent. Since at least as early as January 2008, Serva Group, LLC has been actively manufacturing and selling powder mixers covered by the ‘330 patent.

11. On January 29, 2008, Tom Allen filed U.S. Patent Application No. 12/021,415 (the “‘415 application”) (attached hereto as Exhibit “B”). The ‘415 application purports to provide an improvement to the powder mixer described in the ‘330 patent. The ‘415 application describes a powder mixer that is covered by claims of the ‘330 patent.

12. On March 20, 2008, Tom Allen filed U.S. Patent application no. 12/052, 194 (the “‘194 application”) (attached hereto as Exhibit “C”). The ‘194 application claims priority to the ‘415 application as a continuation-in-part. The ‘194 application describes a powder mixer that is covered by claims of the ‘330 patent.

13. Allen Associates and Allen Manufacturing began manufacturing, offering for sale and selling powder mixers (the “Allen Mixer”) following the assignment and sale of the ‘330 patent to Serva. The Allen Mixer is currently included in a product catalog available on

Defendants' website. Based on their own assertions, Allen Associates and Allen Manufacturing have collectively sold approximately eighteen Allen Mixers as of November 2, 2010.

15. Allen Associates' and Allen Manufacturing's manufacture and sale of the Allen Mixer has been and continues to be without permission from Serva and is in direct competition with Serva Group, LLC.

16. By a letter to Tom Allen dated October 1, 2010, Serva demanded that Allen Manufacturing cease and desist manufacturing and selling the Allen Mixer or any like device that infringes the '330 patent.

17. Upon information and belief, Allen Associates and Allen Manufacturing have not ceased or desisted further infringement of the '330 patent.

18. The Allen Mixer includes each and every element of at least claims 11-14 of the '330 patent and operation of the Allen Mixer requires performance of each and every step of at least claims 17-19 of the '330 patent.

CAUSE OF ACTION

19. Third Party Plaintiffs incorporate by reference the allegations contained in each preceding paragraph as if fully set forth herein.

20. Allen Associates and Allen Manufacturing have been making, offering to sell and selling products, including the Allen Mixer, that directly infringe and/or are inducing and/or contributing to the infringement of the referenced Claims of the '330 patent.

21. As the sole listed inventor on the '330 patent, Tom Allen had actual knowledge of the '330 patent.

22. Tom Allen designed the Allen Mixer and filed patent applications on the Allen Mixer as the sole inventor. As such, Tom Allen knew or should have known that the Allen

Mixer contained all the elements of at least claims 11-14 of the '330 patent and that use requires performance of each step of at least claims 17-19 of the '330 patent.

23. Upon information and belief, Tom Allen, as president of Allen Associates and president, manager or principal of Allen Manufacturing, controlled and continues to control the infringing activity of Allen Associates and Allen Manufacturing and thereby induced and induces and/or contributed and contributes to infringement of the '330 patent.

24. As a direct and proximate consequence of the acts and practices of Tom Allen, Third Party Plaintiffs have been, are being, and, unless such acts and practices are enjoined by the Court, will continue to be irreparably injured in their business and property rights, and have suffered, are suffering, and will continue to suffer injury and damages for which they are entitled relief.

Request For Relief

WHEREFORE, Third Party Plaintiffs request that judgment be entered in their favor as to all causes of action asserted against Tom Allen and granting Third Party Plaintiffs the following relief:

1. Declaring that Allen Associates and Allen Manufacturing making, offering to sell and sale of its products directly infringe claims of the '330 patent and induce and/or contribute to the infringement of the claims of the '330 patent;

2. Declaring that Tom Allen's actions willfully induced and/or contributed to infringement of the '330 patent and enjoining Third Party Defendant from inducing and/or contributing to the infringement of the '330 patent;

3. An order that Tom Allen is liable for all damages arising out of the infringing activities of Allen Associates and Allen Manufacturing and an award of all damages in

accordance with 35 U.S.C. § 284 (including treble damages) and declaring and exceptional case and awarding attorneys fees pursuant to 35 U.S.C. § 285; and

4. Awarding Third Party Plaintiffs such other and further relief as the Court deems just and proper.

DATED this 21st day of March, 2011.

s/ John A. Kenney

John A. Kenney, OBA #4976
McAfee & Taft A Professional Corporation
Tenth Floor, Two Leadership Square
211 N. Robinson Avenue
Oklahoma City, OK 73102-7103
405/235-9621
405/235-0439 (Fax)
Email: john.kenney@mcafeetaft.com

**ATTORNEYS FOR THIRD PARTY
PLAINTIFFS SERVA CORPORATION
AND SERVA GROUP, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk will transmit a Notice of Electronic Filing to the following ECF registrants:

Gerald L. Jackson
Margaret S. Millikin
CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103-3313

s/ John A. Kenney